

**REMARKS**

Claims 11 and 17 through 36 are pending in this Application. Claims 11, 17, 21, 29, 30, 33 and 34 have been amended and new claims 37 through 41. Care has been exercised to avoid the introduction of new matter. Adequate descriptive support for the present Amendment should be apparent throughout the originally filed disclosure. Applicant submits that the present Amendment does not generate any new matter issue.

**Claims 29 and 33 were rejected under 35 U.S.C. § 102 for lack of novelty as evidenced by Gould.**

In the statement of the rejection the Examiner referred to Fig. 1, element 10, and the related portion thereof in the patent text, asserting the disclosure of an apparatus corresponding to that claimed. This rejection is traversed.

The factual determination of lack of novelty under 35 U.S.C. § 102 requires the identical disclosure in a single reference of each element of a claimed invention, such that the identically claimed invention is placed into the recognized possession of one having ordinary skill in the art. *Dayco Prods., Inc. v. Total Containment, Inc.*, 329 F.3d 1358, 66 USPQ 2d 1801 (Fed. Cir. 2003); *Crown Operations International Ltd. v. Solutia Inc.*, 289 F.3d 1367, 62 USPQ2d 1917 (Fed. Cir. 2002). In imposing a rejection under 35 U.S.C. § 102, the Examiner is charged with the initial burden of specifically identifying wherein an applied reference is perceived to identically disclose each and every feature of a claimed invention. *In re Rijckaert*, 9 F.3d 1531, 28 USPQ2d 1955 (Fed. Cir. 1993); *Lindemann Maschinenfabrik GMBH v. American Hoist & Derrick Co.*, 730 F.2d 1452, 221 USPQ 481 (Fed. Cir. 1984). That burden has not been discharged. Moreover, there are significant differences between the claimed invention, particularly as now presented, and Gould's

apparatus that scotch the factual determination that Gould discloses an apparatus identically corresponding to that claimed.

Initially, even without the present Amendment, the apparatus defined in independent claim 29 requires means for maintaining bodies of meat during agitation at a predetermined elevated temperature sufficient to effect rapid, thorough and uniform distribution of the liquid within the meat, and to substantially reduce formation of a protein/water film by selectively heating and cooling the vessel while agitating the bodies of meat. The apparatus defined in independent claim 33 requires means for maintaining the bodies of meat during agitation at substantially 45°F to 60°F. The Examiner refers to column 6 of Gould, lines 35 through 59, which undeniably discloses a temperature-cooling fluid. Adverting to column 1 of Gould, a temperature of 32°F to 34°F is disclosed as an appropriate temperature when processing meat to facilitate the distribution of a curing ingredient and to insure a greater release of myosin. It is also disclosed that meat and poultry are massaged at **lower** temperatures. Thus, temperatures of 34°F and lower are the temperatures for massaging in connection with a treating liquid.

Elevated temperatures are also disclosed in the paragraph bridging columns 1 and 2 of Gould; however, these temperatures are for **dehydrating and cooking**. These elevated temperatures are **not**, repeat **not**, for maintaining bodies of meat during agitation to effect the result specified in claim 29, or the temperature range of 45°F to 60°F. Gould is completely **silent** with respect to the concept of selectively heating and cooling to optimize treatment with a fluid, as in the claimed invention. This is because Gould is oblivious to the problems addressed and solved by the claimed invention.

At any rate, in order to expedite prosecution, claims 29 and 33 have been amended by including a jacket on the vessel for circulating a temperature controlling fluid. **No such jacket is**

**disclosed or suggested by Gould who requires internal passage of a temperature-controlling fluid.**

The above argued structural differences between the claimed apparatus and Gould's apparatus undermine the factual determination that Gould discloses an apparatus identically corresponding to that claimed. *Minnesota Mining & Manufacturing Co. v. Johnson & Johnson Orthopaedics Inc.*, 976 F.2d 1559, 24 USPQ2d 1321 (Fed. Cir. 1992); *Kloster Speedsteel AB v. Crucible Inc.*, 793 F.2d 1565, 230 USPQ 81 (Fed. Cir. 1986). Applicant, therefore, submits that the imposed rejection of claims 29 and 33 under 35 U.S.C. § 102 for lack of novelty as evidenced by Gould is not factually viable and, hence, solicits withdrawal thereof.

**Claims 21, 29 and 33 were rejected under 35 U.S.C. § 102 for lack of novelty as evidenced by Bellue.**

In the statement of rejection the Examiner referred to Fig. 1 of Bellue and to column 3, lines 32 through 43, asserting the disclosure of an apparatus corresponding to that claimed. This rejection is traversed.

Again, the factual determination of lack of novelty under 35 U.S.C. § 102 requires the **identical** disclosure in a single reference of **each** element of a claimed invention, such that the **identically** claimed invention is placed into the recognized possession of one having ordinary skill in the art. *Dayco Prods., Inc. v. Total Containment, Inc.*, *supra*; *Crown Operations International Ltd. v. Solutia Inc.*, *supra*. In imposing a rejection under 35 U.S.C. § 102, the Examiner must specifically identify wherein an applied reference is perceived to identically disclose each and every feature of a claimed invention. *In re Rijckaert*, *supra*; *Lindemann Maschinenfabrik GMBH v. American Hoist & Derrick Co.*, *supra*. That burden has not been discharged. Moreover, there are

significant differences between the claimed apparatus, particularly as now presented, and Bellue's apparatus that scotch the factual determination that Bellue discloses an apparatus identically corresponding to that claimed.

Initially, even before the present Amendment, each of the rejected claims is directed to an apparatus structured to distribute a treating liquid in a body of meat. The entire invention pivots about the distribution of a treating liquid in a body of meat. The apparatus claimed must be capable of distributing the treating liquid in bodies of meat, as specifically recited therein. It is not apparent and the Examiner did not identify any factual basis upon which to predicate the determination that the "cooking pot" disclosed by Bellue is capable of distributing a treating liquid in bodies of meat, as in the claimed invention.

Indeed, as one having ordinary skill in the art would have recognized, and as disclosed by Gould in the third full paragraph at column 1, an apparatuses employed for treating a body of meat in contact with a treating liquid are typically a tumbler, which contains paddles or baffles imparting impact energy on the muscle tissue of meat, or a massager which kneads bodies of meat. Such types of apparatus do not include a "cooking pot" as disclosed by Bellue.

At any rate, as each of independent claims 21, 29 and 33 has been clarified by reciting that the apparatus comprises either a rotating paddle stationary vessel massager or a rotating vessel tumbler containing impact vanes. Bellue's "cooking pot" is not a rotating paddle stationary vessel massager or a rotating vessel tumbler containing impact vanes. Moreover, as previously argued Bellue's "cooking pot" is not structured to distribute a treating liquid in bodies of meat.

The above argued structural differences between the claimed apparatus and Bellue's "cooking pot" undermine the factual determination that Bellue discloses an apparatus ("cooking pot") identically corresponding to that claimed. *Minnesota Mining & Manufacturing Co. v. Johnson*

*& Johnson Orthopaedics Inc., supra; Kloster Speedsteel AB v. Crucible Inc., supra.* Applicant, therefore, submits that the imposed rejection of claims 21, 29 and 33 under 35 U.S.C. § 102 for lack of novelty as evidenced by Bellue is not factually viable and, hence, solicits withdrawal thereof.

**Claims 22 and 23 were rejected under 35 U.S.C. § 103 for obviousness predicated upon Bellue in view of Burkhart.**

This rejection is traversed.

Claims 22 and 23 depend from independent claim 21. Applicant incorporates herein the arguments previously advanced in traversing the imposed rejection of claim 21 under 35 U.S.C. § 102 for lack of novelty as evidenced by Bellue. Specifically, Bellue neither discloses nor suggests a rotating paddle stationary vessel massager or a rotating vessel tumbler containing impact vanes, as recited in claim 21. Moreover, there is no apparent factual basis upon which to predicate the determination that Bellue's cooking pot is capable of distributing a treating liquid in bodies of meat as claimed. The additional reference to Burkhart does not cure the argued deficiencies of Bellue.

Indeed, the Examiner relies upon Burkhart for a temperature sensor. Even if Bellue is modified as suggested by the Examiner in view of the teachings of Burkhart, and Applicant does not agree that the requisite fact-based motivation has been established, the claimed invention would not result, because the resulting apparatus would still be a "cooking pot"- **not** a rotating paddle stationary vessel massager or a rotating vessel tumbler containing impact vanes, capable of distributing a treating liquid in bodies of meat. *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 5 USPQ2d 1434 (Fed. Cir. 1988).

Accordingly, a *prima facie* basis to deny patentability to the claimed invention has not been established for lack of the requisite factual basis and want of the requisite realistic motivation.

Moreover, it is apparent that the Examiner improperly declined to even give lip service to the potent indicia of **nonobviousness** argued in the Amendment pursuant to 37 C.F.R. § 1.114 submitted on August 16, 2004.

Specifically, Applicant **discovered problems** attendant upon conventional practices of massaging bodies of liquid-injected meat at a relatively low temperature. These problems are disclosed in paragraphs [0008] and [0009] of the written description and include, for example, impedance of effective massaging by virtue of water binding to proteins released from the meat to form a compound which may be exuded and form a coating or internal barrier, thereby impeding penetration, absorption and/or dispersion of the treatment solution. Other problems include the inability to develop uniform internal coloration, reduction of friction and breakdown of treating solutions, such as polyphosphates and nitrites by enzymes in the meat, thereby preventing effective and efficient utilization of such additives. Applicants **discovery of such problems** attendant upon conventional practices of massaging bodies of liquid-injected meat at a low temperature have **not** been disputed on this record and must, therefore, be accepted. *In re Clinton*, 527 F.2d 1226, 188 USPQ 365 (CCPA 1976). It is well settled that the **discovery** of a **problem** attendant upon prior art practices constitutes a potent indicium of **nonobviousness** which must be given consideration. *In re Spinnoble*, 405 F.2d 578, 160 USPQ 237 (CCPA 1969).

There is another potent indicium of **nonobviousness** stemming from the problem addressed and solved by the claimed invention which must be given consideration in resolving the ultimate legal conclusion of obviousness under 35 U.S.C. § 103. *North American Vaccine, Inc. v. American Cyanamid Co.*, 7 F.3d 1571, 28 USPQ2d 1333 (Fed. Cir. 1993); *Northern Telecom, Inc. v. Datapoint Corp.*, 908 F.2d 931, 15 USPQ2d 1321 (Fed. Cir. 1990); *In re Newell*, 891 F.2d 899, 13 USPQ2d 1248 (Fed. Cir. 1989); *In re Nomiya*, 509 F.2d 566, 184 USPQ 607 (CCPA 1975). These

problems addressed and solved by the claimed invention, as previously pointed out, relate to the impedance of effective massaging and effective utilization of treating solutions (paragraphs [0008] and [0009] of the written description). None of the applied references discloses or expresses any recognition of such problems, because they are addressed to **cooking pots**. Under such circumstances, the problems addressed and solved by the claimed invention must be given consideration as a potent indicium of **nonobviousness**.

### **Conclusion**

Based upon the foregoing it should be apparent that a *prima facie* basis to deny patentability to the claimed invention under 35 U.S.C. § 103 has not been established for lack of the requisite factual basis and want of the requisite realistic motivation. Moreover, upon giving due consideration to potent indicium of **nonobviousness** stemming from Applicant's discovery of problems attendant upon prior art practices and the solutions thereto encompassed by the claims, the conclusion appears inescapable that one having ordinary skill in the art would **not** have found the claimed invention **as a whole** obvious within the meaning of 35 U.S.C. § 103. *Jones v. Hardy*, 727 F.2d 1524, 220 USPQ 1021 (Fed. Cir. 1984).

Applicant, therefore, submits that the imposed rejection of claims 22 and 23 under 35 U.S.C. § 103 for obviousness predicated upon Bellue in view of Burkhardt is not factually or legally viable and, hence, solicits withdrawal thereof.

**Claims 24 and 25 were rejected under 35 U.S.C. § 103 for obviousness predicated upon Bellue in view of Burkhart and DE 3119496A.**

This rejection is traversed. Specifically, claims 24 and 25 depend from claim 22 which, in turn, depends from independent claim 21. Applicant incorporates herein the arguments previously advanced in traversing the imposed rejection of claim 21 under 35 U.S.C. § 102 for lack of novelty as evidenced by Bellue, and the imposed rejection of claim 22 under 35 U.S.C. § 103 for obviousness predicated upon Bellue in view of Burkhart. The additional reference to DE 3119496A does not cure the argued deficiencies of Bellue, or the argued deficiencies in the attempted combination of Bellue and Burkhart. Accordingly, even if the applied references are combined as suggested by the Examiner, and again Applicant does not agree that the requisite fact-based motivation has been established, the claimed invention would not result. *Uniroyal, Inc. v. Rudkin-Wiley Corp., supra.*

Applicant, therefore, submits that the imposed rejection of claims 24 and 25 under 35 U.S.C. § 103 for obviousness predicated upon Bellue in view of Burkhart and DE 3119496A is not factually or legally viable and, hence, solicits withdrawal thereof.

**Claims 26, 30 and 34 were rejected under 35 U.S.C. § 103 for obviousness predicated upon Bellue in view of Ludwig.**

In the statement of the rejection the Examiner admitted that Bellue does not disclose a refrigeration unit and a rotary paddle. The Examiner then points to Ludwig's meat massager and somehow concluded that one having ordinary skill in the art would have been motivated to modify Bellue's "cooking pot" to incorporate a refrigeration unit and then to incorporate torque controlled



paddles, erroneously asserting that both of the applied references are directed to meat massaging devices **which they are not**. This rejection is traversed as factually and legally erroneous.

Bellue discloses a **cooking pot for cooking food**. Ludwig discloses a **paddle massager** for treating meat products with an aqueous solution, such as a brine, by massaging meat products in the presence of the brine. The Examiner did not discharge the judicially imposed initial burden by making the requisite **clear and particular** factual findings as to a **specific** understanding or **specific** technological principle and then, based upon such factual determination explain why one having ordinary skill in the art would have been realistically led to modify Bellue's **cooking pot** by providing internal rotary paddles for massaging the meat during cooking. *In re Lee*, 237 F.3d 1338, 61 USPQ2d 1430 (Fed. Cir. 2002); *Ecolochem Inc. v. Southern California Edison, Co.*, 227 F.3d 1361, 56 USPQ2d 1065 (Fed. Cir. 2000); *In re Kotzab*, 217 F.3d 1365, 55 USPQ 1313 (Fed. Cir. 2000); *In re Dembiczak*, 175 F.3d 994, 50 USPQ2d 1614 (Fed. Cir. 1999); *In re Rouffet*, 149 F.3d 1350, 47 USPQ2d 1453 (Fed. Cir. 1998). That Bellue's **cooking pot** is rotatable does not convert it into a **paddle meat massager**. That the Examiner calls Bellue's **cooking pot** a meat massaging device does not make it so. The paddles of Ludwig are designed for massaging. Bellue does not seek to massage.

The Examiner asserts the torque control disclosed by Ludwig improves water bonding without damage to the muscle tissue. What that determination has to do with the obviousness issue at hand is not apparent. But Applicant would stress that the Examiner conspicuously eschews identifying anything in Bellue which would suggest that "improved water bonding without damage to the muscle tissue" is desired for cooking in the disclosed **cooking pot**.

Based upon the foregoing it should be apparent that the Examiner did not establish a *prima facie* basis to deny patentability to the claimed invention under 35 U.S.C. § 103 for lack of the

requisite factual basis and want of the requisite realistic motivation. Moreover, as previously argued, there are potent indicia of **nonobviousness** of record stemming from Applicant's discovery of problems attendant upon prior conventional processes for distributing a treating liquid in bodies of meat which constitutes **evidence of nonobviousness**. *In re Spinnoble, supra*. Moreover, the failure of the applied prior art to address or suggest a solution to such problems constitutes further evidence of **nonobviousness** which must be given consideration. *North American Vaccine, Inc. v. American Cyanamid Co., supra*; *Northern Telecom, Inc. v. Datapoint Corp., supra*; *In re Newell, supra*; *In re Nomiya, supra*.

Indeed, the primary reference to Bellue is a **cooking pot**, not an apparatus as claimed, which is structured to distribute a treating liquid throughout bodies of meat. Accordingly, the problems addressed and solved by the claimed invention are of no interest to Bellue.

Based upon the foregoing, it should be apparent that the Examiner did not establish a *prima facie* basis to deny patentability to the claimed invention under 35 U.S.C. § 103 for lack of the requisite factual basis and want of the requisite realistic motivation. Moreover, upon giving due consideration to the potent indicia of **nonobviousness** of record, stemming from Applicant's discovery of the source of problems attendant upon conventional practices and the solutions encompassed by the claims, the conclusion appears inescapable that one having ordinary skill in the art would **not** have found the claimed invention **as a whole** obvious within the meaning of 35 U.S.C. § 103. *Jones v. Hardy, supra*.

Applicant, therefore, submits that the imposed rejection of claims 26, 30 and 34 under 35 U.S.C. § 103 for obviousness predicated upon Bellue in view of Ludwig is not factually or legally viable and, hence, solicits withdrawal thereof.

**Claims 17 through 19, 27, 28, 31, 32, 35 and 36 were rejected under 35 U.S.C. § 103 for obviousness predicated upon Bellue in view of Ludwig and Burkhart.**

This rejection is traversed.

Again, Bellue is directed to a **cooking pot**. Ludwig is directed to a device structured to control the torque of rotary paddles in treating bodies of meat with a treating fluid, such as brine, for distribution therein. Bellue does not seek to distribute any fluids throughout bodies of meat. There is no conceivable reason why one having ordinary skill in the art would have been realistically impelled to modify Bellue's **cooking pot** by providing the **rotary paddle torque control system** of Ludwig. The additional reference to Burkhart does not cure the argued deficiencies in the attempted combination of Bellue and Ludwig.

As previously argued, the Examiner failed to comply with judicial mandates requiring clear and particular factual findings as to a specific understanding or specific technological principle which would have realistically impelled one having ordinary skill in the art to modify Bellue's **cooking pot** by providing torque control means for rotary paddles therein, particularly since Bellue's cooking pot is not a meat massaging device but just what the title says – a "cooking pot". *In re Lee, supra; Ecolochem Inc. v. Southern California Edison, Co., supra; In re Kotzab, supra; In re Dembiczak, supra; In re Rouffet, supra.*

Moreover, as also previously argued, the Examiner has consistently declined to give any consideration to a potent indicia of **nonobviousness** stemming from Applicant's discovery of the source of problems attendant upon prior art practices, or the problems addressed and solved by the claimed invention which do not exist in Bellue's **cooking pot**, and Bellue is the primary reference. *In re Sponnoble, supra; North American Vaccine, Inc. v. American Cyanamid Co., supra; Northern Telecom, Inc. v. Datapoint Corp., supra; In re Newell, supra; In re Nomiya, supra.*

Based upon the foregoing Applicant submits that the Examiner did not establish a *prima facie* basis to deny patentability to the claimed invention under 35 U.S.C. § 103 for lack of the requisite factual basis and want of the requisite realistic motivation. Moreover, upon giving due consideration to the potent indicia of nonobviousness of record stemming from Applicant's discovery of the source of problems attendant upon prior art practices and Applicant's solution thereto encompassed by the claims, the conclusion appears inescapable that one having ordinary skill in the art would not have found the claimed invention as a whole obvious within the meaning of 35 U.S.C. § 103. *Jones v. Hardy, supra*.

Applicant, therefore, submits that the imposed rejection of claims 17 through 19, 27, 28, 31, 32, 35 and 36 under 35 U.S.C. § 103 for obviousness predicated upon Bellue in view of Ludwig and Burkhart is not factually or legally viable and, hence, solicits withdrawal thereof.

**Claims 11 and 20 were rejected under 35 U.S.C. § 103 for obviousness predicated upon Bellue in view of Ludwig, Burkhart and DE 3119496A.**

This rejection is traversed. As previously argued, the Examiner did not make the requisite clear and particular factual findings as to a specific understanding or specific technological principle which would have realistically impelled one having ordinary skill in the art to modify Bellue's specific **cooking pot** by providing rotary paddles and torque control means as disclosed by Ludwig in connection with a massaging device, because Bellue's device is not a meat massager but a **cooking pot** as the title states and as disclosed. *In re Lee, supra; Ecolochem Inc. v. Southern California Edison, Co., supra; In re Kotzab, supra; In re Dembiczak, supra; In re Rouffet, supra*. The additional references to Burkhart and DE 3119496A do not cure the argued deficiencies in the attempted combination of Bellue and Ludwig.

Moreover, as also previously argued, the Examiner has committed legal error in declining to give consideration to the potent indicia of nonobviousness of record stemming from Applicant's discovery of the source of problems attendant upon prior art meat massaging practices and the solutions thereto encompassed by the claims. *In re Sponnoble, supra; North American Vaccine, Inc. v. American Cyanamid Co., supra; Northern Telecom, Inc. v. Datapoint Corp., supra; In re Newell, supra; In re Nomiya, supra.*

Applicant, therefore, submits that the Examiner did not establish a *prima facie* basis to deny patentability to the claimed invention under 35 U.S.C. § 103 for lack of the requisite factual basis and want of the requisite realistic motivation. Moreover, upon giving due consideration to the potent indicia of **nonobviousness** of record stemming from Applicant's discovery of the source of problems attendant upon prior art meat massaging practices (and Bellue is not concerned with meat massaging but **cooking**) and Applicant's solution thereto encompassed by the claims, the conclusion appears inescapable that one having ordinary skill in the art would **not** have found the claimed invention **as a whole** obvious within the meaning of 35 U.S.C. § 103. *Jones v. Hardy, supra.*

Applicant, therefore, submits that the imposed rejection of claims 11 and 20 under 35 U.S.C. § 103 for obviousness predicated upon Bellue in view of Ludwig, Burkhardt and DE 3119496A is not factually or legally viable and, hence, solicits withdrawal thereof.

### **New Claims 37 through 41**

New claims 37 through 41 are free of the applied prior art by virtue of their dependence upon claims 11, 17, 21, 29 and 33, respectively. The patentability of which has been previously argued. Moreover, Applicants separately argue the patentability of each of claims 37, 38, 39, 40 and 41 based upon the limitations expressed therein. Applicant again stresses that Bellue's cooking pot

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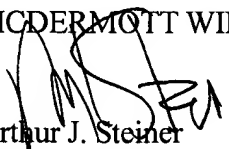
is not and would not have been interpreted as a rotating paddle stationary vessel massager. Moreover, there is no factual basis upon which to predicate the conclusion that one having ordinary skill in the art would somehow have been realistically impelled to convert Bellue's cooking pot into a rotating paddle stationary vessel massager, as a rotating paddle stationary vessel massager would have been understood by one having ordinary skill in the art. Accordingly, claims 37, 38, 39, 40 and 41 are also free of the applied prior art.

Based upon the foregoing it should be apparent that the imposed rejections have been overcome and that all pending claims are in condition for immediate allowance. Favorable consideration is, therefore, solicited.

To the extent necessary, a petition for an extension of time under 37 C.F.R. 1.136 is hereby made. Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account 500417 and please credit any excess fees to such deposit account.

Respectfully submitted,

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